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In The Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Nevada

BRIEF OF *AMICI CURIAE* PRIVACYACTIVISM, CYBER PRIVACY PROJECT, AND FREETOTRAVEL.ORG IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST BY *AMICI CURIAE*[1]

Amicus curiae PrivacyActivism is a non-profit organization dedicated to informing and empowering individuals about their privacy rights on the Internet. Through a mixture of education (using graphics such as posters and video games), activism, and the law, we strive to make complex issues of privacy law, policy, and technology accessible to all. Because we feel that the ruling in this case has not adequately taken into account the severity of privacy and anonymity issues, we believe this ruling should be reversed.

Amicus curiae Cyber Privacy Project (CPP) is a non-partisan organization focusing on governmental intrusions against Fourth and Fifth Amendment rights of personal privacy, particularly in governmental databanks and national identification schemes for work and travel, and on medical confidentiality and patient consent. CPP director Richard Sobel is a scholar of identity issues, and a senior research associate at the Program in Psychiatry and the Law at Harvard Medical School.

Amicus curiae FreeToTravel.org is an association with the mission of protecting the constitutional right to travel and more generally preserving freedom of movement. *Amicus* educates policymakers, the press, and the general public about travel issues, publishes archives of right to

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

travel jurisprudence, and supports litigation to protect free travel interests.

Amici believe that pedestrian identification requirements seriously inhibit free movement, free speech and association, the ability to engage in these pursuits anonymously, and the right to remain free from unreasonable searches. Consequently, *Amici* have a vital interest in the outcome of this case and encourage this Court to draw a bright line rule stating that compelled identification is unconstitutional.

SUMMARY OF THE ARGUMENT

In Nevada today, police officers may choose whether or not to demand identification from pedestrians during lawful *Terry* stops. If the pedestrian refuses to identify himself, he risks arrest. The result is that innocent persons, who would otherwise be free to leave after the brief *Terry* detention, must now identify themselves as a condition of ending that encounter. This situation has a profound impact that reaches beyond the guarantees of the Fourth Amendment and falls squarely into the realm of First Amendment abuse. A great deal of protected First Amendment activity can appear suspicious within the definition provided by *Terry* and its progeny. This Court has already decided in cases based on such fundamentally First Amendment-protected activities that requiring participants to reveal their identities is too chilling to permit.

ARGUMENT

I. Under Nevada's Ruling, a *Terry* Stop Becomes an Identification Checkpoint, Invasively Requiring Innocent Pedestrians to Divulge Their Identities or Face Arrest.

Prior to the Nevada Supreme Court's ruling, innocent pedestrians were secure in the knowledge that if they were stopped, pursuant to a lawful *Terry* investigation, they would be free to resume their activities after a brief detention. Under the Nevada rule, however, such persons must now take an affirmative action to regain their freedom – they must identify themselves or face arrest. A *Terry* stop under the Nevada rule thus becomes an identification checkpoint in which innocent persons are forced to justify their very existence to officers, or be arrested.

Contrary to Judge Young's assertion, "[r]equiring identification" is not "far less intrusive than conducting a pat down search of one's physical person." *Hiibel v. Sixth Judicial Dist. Court*, 59 P.3d 1201, 1206 (Nev. 2002). A *Terry* frisk can be performed on anyone, is over quickly, and leaves no lasting traces. An officer encountering the same person the next day cannot frisk that person again based on the previous night's *Terry* stop. An identification demand, however, cannot be satisfied by someone without a credential. And if a credential is provided, nothing prevents an officer from remembering the identity, writing it down, or radioing it in to headquarters, actions considered good police practice. Nothing prevents the officer from looking the suspect up in a database after the *Terry* encounter has ended, or from recording the identities of persons routinely *Terry* stopped, perhaps to trade notes with other officers. Moreover, credentials seldom contain just a name. Instead, every bit of information on the

credential, or tied to it in a database, now becomes accessible to the officer and his colleagues. Home address, date of birth, Social Security number, fingerprints, arrest records, driving history, employment, banking, publications, Internet commentary, DNA samples, and health history, are but a few of the details about a person which could potentially be accessed.

Terry frisks must be limited to weapons detection. Nevada suggests that "knowing the identity of a suspect allows officers to more accurately evaluate and predict potential dangers that may arise during an investigative stop." *Hiibel*, 59 P.3d at 1205. Nevada's premise is specious. To be of any practical value, officers will not stop at merely obtaining identification, but will verify it in computerized databases and retrieve additional data, such as a residence address. Officers will then be able to decide, on a whim, whether a suspect "belongs" in the expensive neighborhood in which he is *Terry* stopped, especially if his listed home address is a housing project.

When identification may not be compelled, innocent pedestrians whose faults lie solely in suspicious skin color, hair styles, or clothing know that if they are stopped, they may be twenty minutes late to their intended engagement, and have to suffer the indignity of a pat down. Having committed no crime, however, such pedestrians should be secure in the knowledge that, while *Terry* stops are annoying and temporarily rob them of their right to walk the streets unmolested, they will not ultimately be arrested for merely appearing suspicious. *Terry* stops are especially frequent for minorities in high crime areas. As a result,

certain innocent persons, especially minorities, are undoubtedly accustomed to being routinely stopped by police.[2]

Under Nevada's version of *Terry*, however, those same, ultimately innocent pedestrians are no longer secure in the knowledge that they will merely be late to their destinations. Instead, they must take the active step of identifying themselves, upon pain of arrest. Their release from a *Terry* stop is predicated on relinquishing anonymity, presumably to the officer's satisfaction that they are not wanted or otherwise detainable further.

In *Coffin v. United States*, Justice White traced presumption of innocence to an anecdote by Emperor Julian demonstrating its use. 156 U.S. 432 (1895). At the end of a trial, it was plain that the accuser, Delphidius, had presented insufficient evidence upon which to convict the defendant, who had maintained his innocence and presented no evidence of his own. Delphidius exclaimed, "'Oh, illustrious Caesar! If it is sufficient to deny, what hereafter will become of the guilty?' to which Julian replied, 'If it suffices to accuse, what will become of the innocent?'" *Id.*, at 455. Under the Nevada rule, a person must prove his identity, and implicitly with it, his innocence. This is clearly at odds with American notions of

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[2] Edward Lawson typifies such a person. Lawson was stopped 15 times in a period of less than two years for such reasons as "walking on an otherwise vacant street because it was late at night, the area was isolated, and the area was located close to a high crime area," and "walking at a late hour in a business area where some businesses were still open ... because burglaries had been committed by unknown persons in the general area." *See Kolender v. Lawson*, 461 U.S. 352, n.2 (1983).

innocence and guilt. The assumptions behind a *Terry* identification demand impermissibly reverse the presumption of innocence and give police officers too much discretion.

II. Free Movement and Anonymity Are Essential Elements to the Exercise of Many First Amendment Activities.

A. Free Movement.

Freedom of movement is a necessary condition for the exercise of many First Amendment rights. Routine identity checks desensitize us to their authoritarian nature, eventually eliminating the sense that it is wrong to have to identify ourselves merely to pass from here to there. An identification demand, of any kind, affects an individual's freedom of movement.

This Court has repeatedly found the right to move about freely on public streets as one of the core liberties of citizenship. It rests on personal security against unwarranted searches and seizures and the right to be left alone that this implies. As Chief Justice Warren observed in his majority opinion in *Terry v. Ohio*, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." 392 U.S. 1, 9 (1968).

In *Chicago v. Morales*, this Court affirmed that the "right to remove from one place to another according to inclination [is] an attribute of personal liberty protected by the Constitution." 527 U.S. 41, 53-54 (1999). An "individual's decision to remain in a public place of his choice is as

much a part of his liberty as the freedom of movement inside frontiers that is a part of our heritage, or the right to move to whatsoever place one's own inclination may direct." *Id.*

Few rights guaranteed under the First Amendment may be enjoyed without moving about. In order to associate with others in political activities or pursue religious beliefs, one must be able to go to the place where one's associates meet. In order to assemble and participate in a demonstration against a government policy, boycott a business, or rally on behalf of a political candidate, freedom of movement is a prerequisite. Of course, one may not *speak* to such a rally without traveling.

B. Anonymity.

Use of anonymous rhetoric has a rich history in America dating to the founding of this country. The Federalist Papers are perhaps the finest example of the importance of anonymity.[3] Authored by James Madison, Alexander Hamilton, and John Jay, under the moniker "Publius," the work may never have been published or distributed had the authors been forced to reveal their true identities. Similarly, the pre-Revolutionary War "Letters of Junius" pseudononymously espoused a wealth of constitutional rhetoric during the years 1767-1772,

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[3] THE FEDERALIST PAPERS (Clinton Rossiter, ed., 1961).

including sentiment that ultimately influenced the content of the Bill of Rights.[4]

For centuries, anonymity has also been employed positively for more mundane purposes. In his autobiography, Benjamin Franklin recounted how he employed anonymity not to found a republic but to be printed in his brother's newspaper.[5]

A form of anonymity – substituting a number for a name – is employed by many law journals when assessing the writing skills of prospective journal members. Indeed, this technique of "blinding" academic submissions is similarly employed by law schools around the country during examinations. Moreover, authors in general have a history of adopting pseudonyms,[6] for varying reasons.

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[4] For example, in 1772, Junius wrote, "The liberty of the press is the palladium of all the civil, political and religious rights of an Englishman. . . . " JOSEPH STORY, *Document 33 in* COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

[5] FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN ("[B]eing still a Boy, & suspecting that my Brother would object to printing any Thing of mine in his Paper if he knew it to be mine, I contriv'd to disguise my Hand, & writing an anonymous Paper I put it in at Night under the Door of the Printing House. It was found in the Morning & communicated to his Writing Friends when they call'd in as Usual. They read it, commented on it in my Hearing, and I had the exquisite Pleasure, of finding it met with their Approbation, and that in their different Guesses at the Author none were named but Men of some Character among us for Learning & Ingenuity.")

[6] *E.g.*, Mark Twain (Samuel Langhorne Clemens), O. Henry (William Sydney Porter), Voltaire (Francois Marie Arouet), George Eliot (Mary Ann Evans), Charles Dickens (sometimes writing as "Boz"), and Dr. Seuss (Theodore Geisel).

This Court has recognized the benefits inherent in anonymity spanning this country's history – particularly among dissidents. Throughout *McIntyre v. Ohio Elections Comm'n*, the Court eloquently referenced the "important role in the progress of mankind" that anonymous literature in all forms has played:

> Anonymity . . . provides a way for a writer who may be personally unpopular to ensure that readers will not prejudice her message simply because they do not like its proponent. [There is] a respected tradition of anonymity in the advocacy of political causes. This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.

514 U.S. 334, 341-43 (1995) (quoting *Talley v. California*, 362 U.S. 60, 62 (1960) (internal quotations and footnotes omitted). *See also Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Brown v. Socialist Workers' 74 Campaign Comm.*, 459 U.S. 87, 91 (1982) (holding that the "Constitution protects against the compelled disclosure of political associations"); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 623-28 (1976) (Brennan, J., concurring in part) (asserting disclosure requirements put an impermissible burden on political expression); *Shelton v. Tucker*, 364 U.S. 479, 485-87 (1960) (holding invalid a statute compelling teachers to disclose associational ties because it deprived them of free association rights); *Talley v. California*, 362 U.S. 60, 64-65 (1960) (voiding an ordinance compelling the public identification of group members); *Bates v. City of Little Rock*, 361 U.S. 516, 522-24 (1960) (holding, on free assembly grounds, that the NAACP did not have to disclose its membership lists); *Joint Anti-Fascist Refugee Comm. v.*

McGrath, 341 U.S. 123, 145 (1951) (Black, J., concurring) (expressing the fear that dominant groups might suppress unorthodox minorities if allowed to compel disclosure of associational ties).

Anonymity is also an important guarantor of other First Amendment activity. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . restraint on freedom of association. . . . " *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). "Anonymity is a shield from the tyranny of the majority. It . . . protect[s] unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *McIntyre*, 514 U.S. at 357. It also protects innocent individuals from unwarranted police intrusions.

C. Compelled Identification During *Terry* Could Circumvent Well-Established First Amendment Freedoms.

The effect of compelled identification on First Amendment activity can be seen by removing rights to free movement and anonymity from the exercise of those activities, and evaluating the end results. Mandatory identification schemes "implicate consideration of the constitutional right to freedom of movement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). As identification is anathema to anonymity, such schemes also implicate that right.

In *NAACP v. Alabama ex rel. Patterson*, a unanimous Court noted with concern the "threat of physical coercion, and other manifestations of public hostility" that NAACP members would face if their identities were disclosed. *Id.*

at 462. The Court recognized that advocacy is enhanced by association, and that the ability to speak and associate freely relies on anonymity:

> "We hold that the immunity from state scrutiny . . . is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing to come within the protection of the Fourteenth Amendment."

357 U.S. 449, 465 (1958).

Compelled identification's harm may be especially pronounced in politically active places, such as at protests or at minor political party meetings. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association. . . . " *Id.* at 462. Would protestors bother painting picket signs and traveling to a demonstration if officers had the power to compel their identities upon mere suspicion of wrongdoing? If the protest's theme were shared by a large portion of a community, they might. If the message were unpopular, however, compelled identification might be more likely – due to officer concern that contrarians intend mischief – and ultimately more stifling to the cause. Large numbers of NAACP members may thus have been intimidated into passivity, derailing the civil rights movement, had police been able to demand identification of people participating in NAACP events. Such an intrusion into the free movement of its members might have driven the organization underground, robbing it of the high visibility that was an element crucial to its success.

The *NAACP* Court also noted that compelled identification can "induce members to withdraw from [an] Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *Id.* at 463. To a diligent officer, attendees of a nighttime Alcoholics Anonymous meeting or an inner-city adult literacy class may appear suspicious as they travel to or arrive at their destination. If program participants could be compelled to identify themselves, they may well refrain from attending.

The ability to physically attend meetings and protests, rather than merely read about them, or watch them on television, is generally taken for granted. If identification checkpoints were encountered en route, however, the importance of the "right to wander freely and anonymously" in enabling First Amendment activity would become abundantly more apparent. *Hiibel* at 1204.

D. High Standards Exist for Overcoming Anonymity in Other Legal Areas.

Judge Young argues that "we reveal our names in a variety of situations every day without much consideration," implying that the decision whether or not to reveal one's identity is of effectively "nominal" consequence. *Hiibel v. Sixth Judicial Dist. Court*, 59 P.3d 1201, 1206 (Nev. 2002). Such an assertion is plainly contrary to the amount of litigation on the topic, especially outside of the context of *Terry* and in the recent development of jurisprudence governing Internet defamation. Higher equivalent standards than reasonable suspicion outside of the criminal justice area suggest how inadequate reasonable suspicion alone is for permitting an identity search.

Dendrite International, Inc. v. Doe, No. 3 is recognized by many as the seminal case defining the proper standards for when an Internet Service Provider (ISP) must honor a subpoena for the identity of an anonymous or pseudononymous user. 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). The *Dendrite* defendant used the name, "xxplrr," to post nine comments to a Yahoo! bulletin board about supposed accounting practice changes at Dendrite, as well as an attempt by the CEO to sell the company. The court noted the importance of "striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interest and reputation through the assertion of recognizable claims based on the actionable conduct. . . ." *Id.* at 760. Building upon the framework set out in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), the *Dendrite* court held that an ISP should only be required to provide subscriber identity information: (1) when the court is satisfied, by evidence or pleadings; (2) that the subpoena requester has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed; and (3) the subpoenaed identity information is centrally needed to advance that claim. It is difficult to find an exact fit between this civil rule and criminal procedure requirements. Nonetheless, *Dendrite* plainly demonstrates that people's interests in their identity should not be overcome upon mere allegations of wrong-doing by an allegedly aggrieved party. The weak requirements of reasonable suspicion are analogous to the mere allegations rejected in *Dendrite*, and thus reasonable suspicion provides an insufficient base for an officer to gain identity information from a pedestrian during a *Terry* stop.

Whether or not identity can be compelled is also central to evaluating the boundaries of a reporter's ability to keep a source confidential. As argued in *Branzburg v. Hayes*, reporters' relationships with informants rely primarily on trust that those informants' identities will not be revealed. 408 U.S. 665, 671 n.5 (1972). Journalists thus routinely attempt to quash subpoena motions for their sources' identity, to avoid revealing that information in both civil and criminal cases. The policy interest often advanced by journalists is that the ability of news reporters to collect, assemble, and distribute news to the public is central to the free flow of ideas, and compelling identification would chill those efforts. *See, e.g., Pinkard v. Johnson*, 118 F.R.D. 517, 520 (M.D. Ala. 1987). The emerging standards for compelling information from reporters, whether in civil, or criminal proceedings, do not treat sources' identities as "nominal" bits of information. Rather, courts weigh "the paramount interest served by the unrestricted flow of information protected by the First Amendment [against] the subordinate interest served by the liberal discovery provisions. . . . " *Loadholtz v. Fields*, 389 F. Supp. 1299, 1300 (M.D. Fla. 1975). Civilly, the appropriate test requires the seeking party to show: (1) the identity is relevant; (2) there are no other means for obtaining the identity, or all other means have been exhausted; and (3) there is a compelling reason for the identity. *Id.* Such a standard is significantly higher than the requirements of reasonable suspicion.

III. A Requirement that a Detainee "Shall Identify Himself" is Too Vague to Enforce.

A. Verbal Identification is Vague and Largely Useless.

The core rationale given for the identity exception is that it would help protect officers by alerting them that their detainee is potentially dangerous. *See Hiibel*, 59 P.3d at 1205. But, if Section 171.123(3) is truly limited to verbal identification, little information and little safety is gained. In a small town, it is likely that the name of someone not personally known to the officer will not help that officer assess the danger. In cities, many people may have the same name. In a highly mobile society, a stopped "David Nelson," may be any one of hundreds or thousands of other individuals with the same name.[7] Verbal identities offer the officer little safety, but a large degree of discretionary power.

One could interpret Nevada Revised Statute 171.123(3)'s "shall identify himself" language to compel only a verbal identification, and not the production of credentials. However, many Americans today equate "identification" with a credential such as a driver's license, ID card, or passport, rather than just a verbal act. Even

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[7] According to Pdom.com, an Internet business which researches public records databases and registers personal domains, there are 5,200 persons named David Nelson in the United States. Professor David Nelson of Northwestern University and others, including the son of TV stars Ozzie and Harriet, have been frequently stopped at airports because a David Nelson appears on a government no-fly list. *See* Rex Huppke, *Name Can Set Off Bells with Airport Security: David Nelsons Need Extra Time, Patience, at U.S. Checkpoints,* CHI TRIB, June 29, 2003, at 1.

Judge Young switches back and forth from using the word as a verb, when discussing the statutory language, to a noun, when discussing identification in practice. *Hiibel*, 59 P.3d at 1205, 1206.

If the Court decides that only a verbal response is required, then the statute's wording as it stands would be misleading. Officers will continue to demand that one "identify himself," and the public will almost uniformly feel compelled to offer a credential, even when there is no legal backing for such a demand. The interrogating officer will certainly not offer a clarifying interpretation to the victim of this deception.

Assuming, *arguendo*, that the statute requires only verbal identification, it is nonetheless vague, because the concept of identity is itself vague. What constitutes an acceptable and sufficient response?

- "Larry Hiibel."
- "I am Mrs. John Smith." What if the person is a married woman? Can she give her husband's name, maiden name, or must she give the name she most often uses?
- "Starchild Moonbeam." What if the person has long forsaken his given name, changing under common law but not by formal court decree?
- "My name is Jane." "Dr. Jones, at your service." May one give only a first name, as is customary in situations such as "meeting a new acquaintance"? *Hiibel*, 59 P.3d at 28. Or, may only a last name be given?

- "I'm Magic Johnson." If a person is better known by a nickname than by the name given by his parents is this acceptable?
- "I live here and am walking my dog." Can people describe their lawful presence, rather than providing formal names?
- "George Bush." "I am J. Piermont Morgan." Must a person supply a middle initial or middle name if his first and last name are common? May initials be used in lieu of other parts of a name?
- "My only name is Arvind." There are people who have only one name, because that is the custom of their culture.
- "I am Abdullah Ahmad Badawi." Must people signify which parts of the name they give are honorifics, which are the family name, and which the personal name?

Must any other verbal identifying information be given, such as a date of birth, residence address, telephone number, Social Security number, citizenship, nationality, or employer? If the officer is not satisfied with the initial response and continues asking questions about identity, is the suspect compelled to answer all of them? At what point can he return to remaining silent without risking a legitimate arrest?

If dissatisfied with the verbal identification, or lack thereof, provided during a *Terry* stop, will an officer then have the discretion to commence an identity frisk – for example, by searching the suspect's wallet, purse, or briefcase for identifying information – though there exists no constitutional basis for such searches?

The short statute does not answer any of these questions. It would take dozens of precedent-setting court decisions in different factual circumstances to even pretend to have answers for some of them. Yet innocent citizens being detained must answer them, without guidance, and upon pain of arrest if they answer incorrectly.

B. Requiring a Credential Document is Also Vague, Requires Due Process on Credential Issuance, and Exposes Large Amounts of Irrelevant and Damaging Information.

Assume, *arguendo*, that the plain meaning of "shall identify himself" instead requires that the detainee produce a credential. Such a statute is still highly vague, because the concept of credentials is almost as vague as that of identity. A line of questions arises regarding what credentials are acceptable that closely parallels the previous list of what verbal response would be acceptable.

To mention just a few:

- Is presentation of photo identification sufficient or even necessary?
- Must the person present the "best" identification available at the time, such as a passport one is carrying, over shopping cards or credit cards one is also carrying?

A clarifying construction of "credible and reliable" identification was declared unconstitutionally vague in *Kolender v. Lawson*, thus only a more precise formulation has any hope of constitutionality. 461 U.S. 352, 354 (1983).

Nevada shares borders with California, Oregon, Idaho, Utah, and Arizona. People may constitutionally

enter Nevada on foot or as passengers from any of those states. Most non-Nevadans are not required to obtain or produce any credentials by their home jurisdiction. Even if Nevada were to accept "comparable credentials" from other jurisdictions, vagueness concerns loom. If non-residents risk arrest the moment they set foot in Nevada without credentials acceptable to Nevada, the right of free ingress and regress would be undermined.

A law that makes people subject to arrest unless they follow certain rules, without providing any way for them to follow those rules, would clearly violate the Fourth Amendment protection against unreasonable seizures and raise serious due process concerns.

To obtain a Nevada identification credential, a person must provide a great deal of private information, along with underlying documentation which he may or may not have.[8] *See* NRS 483.850; 483.860. The Nevada credentialing process also requires a physical or mailing address. *Id.* Many retirees are mobile, and have no residence address. Citizens are not otherwise required to have a mailing address, and many do not; yet Nevada law does not accommodate those without addresses. If credentials are required, people must be given ways to obtain those credentials, and due process must attach to their issuance.

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[8] For example, 7,000 citizens of the Tohono O'odham Nation, a large Indian reservation in Arizona, have no birth records because the tribe's customs did not include writing down births. *See* Jeffry Scott, *Nation Divided: Tohono O'odham Campaign for Citizenship*, ARIZONA DAILY STAR, May 30, 2001.

If NRS 171.123(3) were interpreted to require a credential, either the definition of acceptable credentials would be unconstitutionally vague, or many other parts of Nevada law would also have to be reinterpreted to avoid potential due process and equal protection concerns. Neither alternative is acceptable.

C. No Reasonable Interpretation Can Be Made.

Section 171.123(3) demands that a detained pedestrian "shall identify himself, but may not be compelled to answer any other inquiry of any police officer." The statute, however, does not explain how a pedestrian shall effect this identification, nor does it enumerate identification methods that are unacceptable, nor does it provide a procedure to follow should an officer be dissatisfied with an identification attempt. In *Kolender v. Lawson*, the Court held as impermissibly vague a statute requiring "credible and reliable" identification upon being stopped for one of several circumstances set out by California statute. 461 U.S. 352, 354 (1983). At the outset, Nevada's statute is more vague than that struck down in *Kolender*, because it provides even less guidance to officers and pedestrians.

The Nevada scheme creates a broad range of questions, and the statute "requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," in clear violation of the vagueness doctrine. *United States v. Lanier*, 520 U.S. 259, 266 (1997) (internal quotation marks omitted).

"That citizens can walk the streets, without explanation or formal papers, is surely among the cherished liberties that distinguish this nation from so many others." *Gomez v. Turner*, 672 F.2d 134, 143-44 n.18 (D.C. Cir. 1982). This Court should remind the Nevada Supreme Court of this cherished liberty by embracing it fully, and forbidding compelled identification schemes.

IV. Compelled Identification Schemes are Historically Harmful.

The ramifications of identification schemes were eloquently described in *State v. Kerwick*, 512 So. 2d 347, 349 (4th Fla. Dist. Ct. App. 1987):

> "[T]he evidence in this cause has evoked images of other days, under other flags, when no man traveled in his nation's roads or railways without fear of unwarranted interruption, by individuals who had temporary power in the Government. The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers – in short a raison d'etre – is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa."

We agree. Historically, compelled identification was used most prominently to isolate and gather Jews in Germany and Nazi occupied territories before and during World War II. All German Jews were required to apply for identification cards by December 31, 1938, and were

required to carry those cards at all times.[9] The identification system "was a powerful weapon in the hands of the police. . . . It enabled police to pick up any Jew, anywhere, anytime. . . . Identification had a paralyzing effect on its victims. The system induced the Jews to be even more docile. . . . "[10] It was a society where "no one would escape. . . . Never before had so many people been identified so precisely, so silently, so quickly and with such far-reaching consequences. The dawn of the Information Age began at the sunset of human decency."[11]

In 1932, the USSR began requiring citizens to carry internal passports. The Soviet police, or *militsia*, maintained the system of passports that virtually everyone over the age of sixteen was required to have. In addition to standard demographic information, such passports also included employer's name, employment beginning and end dates, and criminal records.[12]

Beginning in 1958 for men, and in 1963 for women, the South African government required blacks to carry passes ("dompas") that prohibited their moving freely

[9] *See* RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 54 (1961).

[10] *Id.* at 58.

[11] EDWIN BLACK, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (2001), p. 104.

[12] *See* RONALD HINGLEY, THE RUSSIAN SECRET POLICE: MUSCOVITE, IMPERIAL RUSSIAN AND SOVIET POLITICAL SECURITY OPERATIONS (1971); *see also* AMY W. KNIGHT, THE KGB: POLICE AND POLITICS IN THE SOVIET UNION (1990).

about the country.[13] The official purpose of the pass was to allow the South African black to prove that he had the right to be present in a specific area.[14] Rwandan massacres of the Tutsi echoed the Holocaust, employing the "carte d'identite," developed when Rwanda was still a Belgian colony,[15] to distinguish Hutus from Tutsis with devastating effects.[16]

The existence of a national identity system does not mean a government will necessarily engage in human rights violations. Instead, it is a "facilitating factor, making it more possible for governments, local authorities or . . . militias to more readily engage in violations."[17] As Britain experienced after creating a national identification system for rationing in 1939, temptation by police officers to use it for routine law enforcement rose, with an increase of identification demands.[18] Protests over routine police

[13] ROGER OMOND, THE APARTHEID HANDBOOK: A GUIDE TO SOUTH AFRICA'S EVERYDAY RACIAL POLICIES, 122 (1986).

[14] *Id.*

[15] In a recent survey of countries' mandatory identification schemes, Austrian comparative law scholar and identity expert Eberhart Theuer stated that in Belgium and Germany carrying an identity credential is mandatory, though without penalty of arrest, while in Denmark not producing identification if there is a duty to do so, constitutes an arrestable offense punishable by fine. *See* Eberhart Theuer, Identity Checks, Subsequent Procedures and the Right to Anonymity in Europe (December 10, 2003) (unpublished manuscript).

[16] James Fussell, "Group Classification on National ID Cards as a Factor in Genocide and Ethnic Cleansing," Paper for the Yale University Genocide Series, November 15, 2001.

[17] *Id.*

[18] See Annie I. Anton, *National Identification Cards* (Dec. 17, 1996), available at http://www.cc.gatech.edu/computing/SW_Eng/people/Phd/id.html.

identification demands contributed to the discard of the national ID card when rationing ended.[19]

The historic abuses of identity demands and national IDs in Nazi Germany and in other 20th century régimes are mirrored today by uses in North Korea, Iran, Iraq, Myanmar, and China of registration, identity demands, and cards for social and population control. Used initially for social services, identification schemes can breed movement control and ultimately abuse.[20]

In stark comparison, government attempts to impose national identification on New Zealand or Australia citizens have been vociferously opposed.[21] Numerous democratic countries, including Sweden, Norway, South Korea, and India do not have national IDs.[22] At best, national identification schemes beget an ever increasing demand for that identification, for increasingly routine and mundane aspects of daily life. At worst, compelled identification can proliferate into a downward spiral of full-fledged systems of social control, and ultimately, oppression. "History demonstrates that the adoption of repressive measures, even to eliminate a clear evil, usually results only in repression more mindless and terrifying than the evil that prompted them. Means have a disturbing

[19] *See* Donna Seaman, *Identity Cards; Trumped Again*, ECONOMIST, Feb. 5, 1994, at 61.

[20] *See* Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J. LAW & TEC 319, 343-49 (2002).

[21] *See* Robert Ellis Smith, *A National ID Card Violates American Traditions*, PRIVACY J., Mar. 1991, 1, 2, 36.

[22] *Id.* at 41.

tendency to become the end result." *Bostick v. State*, 554 So. 2d 1153, 1158-1159 (Fla. 1989).

V. A Bright Line Rule Will Help Citizens Know and Defend Their Rights.

Citizens encountering police face hard choices. Their dilemma is whether or not to assert rights such as refusal to consent, assuming they are even aware of such rights. If they assert their rights incorrectly, they may be arrested and prosecuted for disobeying lawful orders. If they assert no rights and meekly follow orders, they may consent to an embarrassing or incriminating search they could otherwise have refused. If they assert their rights correctly, especially with vigor, they may be deemed "suspicious," receiving additional police attention, and possible punishment. A bright line rule would help all parties know the parameters of the encounter, promoting individual rights and minimizing officer mistakes and liability.

People are afraid to assert their rights to police officers. This is so, in large part, because officers "are cloaked with special authority and obvious power."[23] Confronting an officer is fundamentally different from confronting another pedestrian. "There is authority in the approach of the police, and command in their tone. I can ignore the ordinary person, but can I ignore the police?"[24]

[23] Sykes & Clark, *Deference Exchange in Police-Civilian Encounters, in* POLICE BEHAVIOR: A SOCIOLOGICAL PERSPECTIVE 91 (J. Lundam ed. 1980).

[24] Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L. J. 1161, 1162 (1966).

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Empirical evidence confirms this assertion. In a study of 300 field stops in Chicago, Illinois, every person answered the officer's questions – no one refused.[25] "The only conclusion is that the presence of a police officer, no matter how pleasant his demeanor, implies the potential use of force – force at least to effectuate the stop if not to compel the answers."[26] As noted in *State v. Kerwick*, "[t]his court would ill-expect any citizen to reject, or refuse, to cooperate when faced with the trappings of power like badges and identification cards. And these officers know that – that is one reason that they display those trappings." 512 So. 2d 347, 348-49 (Fla. App., 1987).

In *Miranda v. Arizona*, the Court quoted with approval, "It is probable that even today, . . . there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not." 384 U.S. 436, 468 n.37 (1966) (quoting Lord Devlin, THE CRIMINAL PROSECUTION IN ENGLAND 32 (1958)). Indeed, another reason why people fail to assert their rights is because they fear that to do so would be futile. "In the real world, people are afraid of the power of the police and want to minimize the chances of that power being asserted over them. People do not assert their rights because they know the police are not always respectful of those rights."[27]

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[25] *See* Wayland Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 465, 491 (1967).

[26] *Id.* at 473.

[27] Tracey Maclin, *Seeing the Fourth Amendment from the Backseat of a Police Squad Car*, 70 B.U.L. REV. 543 (1990) (reviewing H. RICHARD UVILLER, TEMPERED ZEAL (1988)).

Belief that asserting rights will create further suspicion is also a concern.[28] Such concern is well-advised, as evidenced in the recent case of *Graves v. City of Coeur D'Alene*, 339 F.3d 828 (9th Cir. 2003). In that case, officers at an Aryan Nation parade were persistently performing consent searches on pedestrians' bags. *Id.* at 835. Plaintiff Crowell was asked several times to submit to a consent search of his backpack, but he refused each time, and continued walking about the area. Crowell was approached again by an officer, who noted that Crowell was carrying a heavy bag containing cylindrical objects, but not otherwise suspicious. The officer continued to demand Crowell consent to a search, and Crowell continued to refuse, asserting his Fourth Amendment rights increasingly loudly to officers and the "crowd of media people" nearby. *Id.* at 836. The officer ultimately arrested Crowell for refusal, citing "the tension in the air just getting thicker and thicker around me, which I did not want" as his justification. *Id.* Crowell was arrested for refusing to consent to a search in front of the media. His bag contained peanut butter. Though the Ninth Circuit upheld his rights, it refused to grant him relief against the officers who violated his rights.

Justice Stewart explained that "[t]he inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals. That is not a political outcome impressed upon an unwilling citizenry by unbeknighted judges. It is the price the framers anticipated

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[28] *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.1, at 259-60 (1975) (citations omitted).

and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power."[29]

In recent cases, this Court has seemingly suggested that citizens' rights are protected by the rule that refusal to cooperate, without more, may not raise the level of suspicion during a police encounter. *See, e.g., Florida v. Bostick*, 501 U.S. 429. This Court has given insufficient recognition to the realities of police encounters. *Amici* respectfully ask the Court to consider the stressful and unnerving situation that a police encounter presents to even the most law-abiding citizen. This Court should aid citizens by enforcing the rights that they already possess: a bright line rule that identification may not be compelled. Such a rule is the only way to breathe life back into the citizen's essential, but much abused, right to say "no."

CONCLUSION

If citizens are required to identify themselves by name during a *Terry* stop today, little prevents the government tomorrow from expanding its notion of identity to include any fact which makes up the bundle of what society generally terms "identity." If Americans must produce credentials, nothing prevents officers from recording those credentials, and entering or retrieving data based upon them. Rights should be affirmed, not abridged, by this Court. Americans have a fundamental right to wander

[29] Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983).

inside this country, to be left alone, and to speak or remain silent, all without the government's permission. Compelled identification during *Terry* encounters will undermine these freedoms with potentially devastating effects. The only clear way this Court can protect its citizens is not by subjecting them to yet another encroachment on their liberties, but by giving them the proper tool to enforce their rights: a bright line rule that identification may not be compelled.

Respectfully submitted,

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